No. 85-1505

In the Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
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TURNBULL CONE BAKING COMPANY OF TENNESSEE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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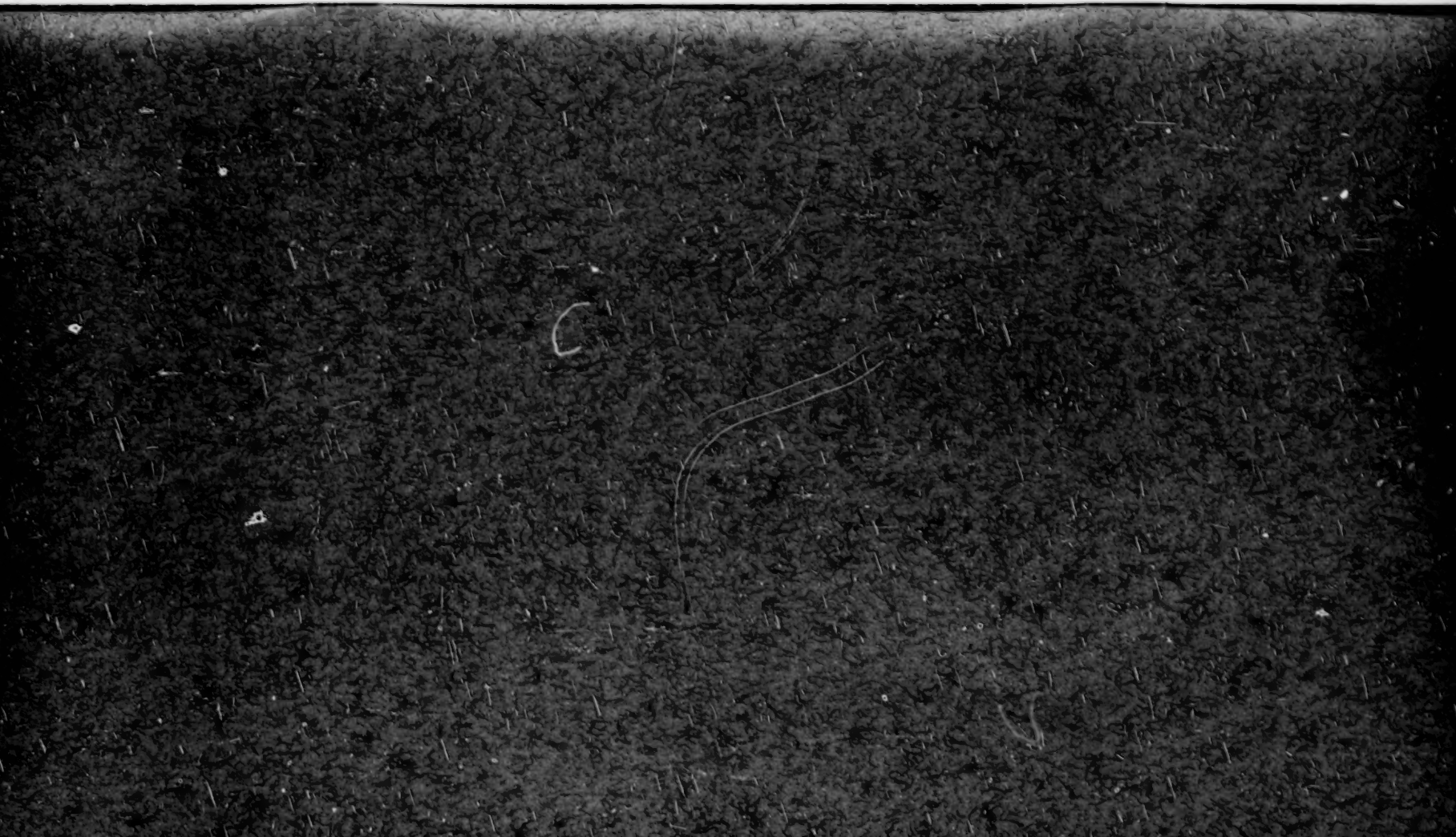

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated the National Labor Relations Act by laying off a group of employees and discharging other employees because of their union activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 778 F.2d 292. The decision and order of the National Labor Relations Board (Pet. App. 13-15), including the decision of the administrative law judge (Pet. App. 16-166), are reported at 271 N.L.R.B. 1320.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1985. The petition for a writ of certiorari was filed on March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act[.]

STATEMENT

The National Labor Relations Board found that petitioner committed numerous violations of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening and interrogating employees concerning their campaign to organize a union, and by engaging in surveillance of employees' union activities. The Board also found that petitioner discriminatorily disciplined one employee and laid off 21 other employees because of their union activities; that it discharged another employee because of his union activity and because he gave testimony at a Board proceeding concerning petitioner's unfair labor practices; and that it discriminatorily forbade an employee to talk with fellow employees because it

wanted to prevent conversation about the union campaign, and then unlawfully discharged the employee for protesting the rule. Petitioner does not challenge the Board's numerous findings of unlawful threats, interrogations, discipline and surveillance, but contends that the Board improperly concluded that the discharges were unlawful.

1. Petitioner manufactures ice cream cones at its plant in Chattanooga, Tennessee. In response to a decline in business, petitioner decided in 1980 and early 1981 to make certain changes designed to increase productivity. Specifically, petitioner decided to discontinue certain product lines and sell some of its machinery and to build a modern plant to replace the facility in which it had operated for many years. It was petitioner's intention to upgrade and consolidate its production processes in the new plant, with the ultimate objective of meeting its current production goals with fewer employees. Petitioner, however, also hoped that its sales might increase so that it might retain at the new plant all or most of its current workforce. Pet. App. 26-42, 141-142.

In late January 1981, petitioner's vice-president and chief operating officer, Wayne Turnbull, assembled the employees and informed them of the company's plans to move to a new facility later in the year. Turnbull did not tell employees that there would be layoffs either before or after the move, but instead stated that there would be a need for all current employees at the new facility and that all male employees would be needed to assist with the move. Pet. App. 32-33. At about the same time, because petitioner wanted to increase its inventory prior to the move, petitioner recalled a number of

employees who had been on seasonal layoff status (*id.* at 37).

Sometime in April, employee Mae Caldwell and her husband, a former company employee, began a union organizational campaign. The Caldwells solicited signatures on union authorization cards from a van that they parked outside the plant. In June, petitioner's production manager, Betty Denton, frequently observed the Caldwells as they campaigned for the Union (Lodge 56 of the Machinists) outside the plant. Pet. App. 42-44. Denton discussed the union campaign with vice-president Turnbull and other company officials, and during those discussions the officials identified the employees known to be involved (*id.* at 44-45).

Between late May and early July, all but one of the employees later found by the Board to have been discriminatorily terminated signed union cards.[1] Employees obtained or returned cards at the Caldwells' van or in the plant. Several of the discriminatees were relatives of the principal union organizers. Pet. App. 43, 45-46, 47, 50-52, 62, 69-70. In mid-June, production manager Denton accused employee

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[1] These employees were Betty Baltimore, Earline Bates, Bobby Bush, Carolyn Caldwell, Jo Ann Cranmore, Donald Ellis, Ellen Finley, Peggy Fitzgerald, Jurrelle Griffin, Bernice Hawthorne, Elroy Hawthorne, James Hawthorne, Athelene Hubbard, Linda Lee, Juanita Prince, Linda Sisk, Wilma Ruth Varner, Evelyn Weaver, Dorothy White, Virginia Wills, and Mary Zackery (Pet. App. 43, 45-47, 50-52, 61-62, 70-71, 72; GCX 15) ("GCX" references are to the General Counsel's exhibits introduced at the unfair labor practice hearing). The one discriminatee who did not sign a card, Sara Wilcox, had been observed by a supervisor to be "talking union" on her break (Pet. App. 49).

Zackery of having signed a union card. On June 29, employee Earline Bates signed a card at the Caldwells' van while company supervisors sat in a car parked near the van. *Id.* at 52, 77. Also on that date, employee Zackery stopped to talk at the Caldwells' van. Zackery then punched in on time and went directly to her machine, but was issued a "warning notice" for reporting to work late. *Id.* at 52-54.

On about July 1, plant manager Tom Hood told employee Bush that he would be fired unless he apologized to vice-president Turnbull for having become involved with the union campaign. Also around that time, various supervisors wrote memos documenting their observations of employees either signing cards or discussing the Union. Pet. App. 46, 49, 86. At a production meeting attended by certain supervisors on July 2, manager Denton became upset and stated that employees would get "writeups" if they joined the Union and also stated that employee James Hawthorne was recruiting people for the Union. Supervisor Evelyn Weaver asked employee Baltimore whether she knew anything about the Union and stated that "the Union would never get in there, that everybody would be gone by then." *Id.* at 48-49, 70. On July 6, employee Sisk told assistant production manager Yvonne Broadwell that she had not signed a union card, to which Broadwell responded (*id.* at 52): " 'Well, Wayne Turnbull will be in here today, and they're liable to shut the plant down.' "

On July 10, petitioner laid off 12 of the employees who had signed cards or had been observed discussing the Union. Employee Finley asked production manager Denton why she was being laid off despite her seniority status, and Denton replied that

"'we're laying you off * * * because I know you signed a union card'" (Pet. App. 64). When employee Bates asked Denton why she had been laid off when another employee had been retained, assistant manager Broadwell, who was also present, asked Bates whether she had signed a union card. *Id.* at 56-64, 66-72, 75-80.

On July 11, vice-president Turnbull held a meeting of the remaining employees and told them about the plans for the move to the new facility. Turnbull stated that there would be no more layoffs, that the employees present at the meeting were "the cream of the crop" and would all be moving to the new plant, and that, as far as he knew, the new plant would operate on the same hours as the old one, and he hoped there would be two shifts. Pet. App. 81-82. The next day, at least 23 persons, 16 of whom were discriminatees, attended the first union meeting. During the meeting, plant manager Hood drove past the union hall several times at a slow speed. After several employees went outside and motioned Hood to stop, Hood asked how the meeting was going and then left. *Id.* at 83-84.

On July 13, the Union requested recognition as the employees' bargaining representative. By letter dated July 16 petitioner refused to recognize the Union without a Board-conducted election and certification. Thereafter, on July 22-24, petitioner terminated all the second shift employees except Evelyn Cooper, the only second shift employee who had not signed a union card. Of the approximately 35 employees remaining on petitioner's payroll after the July separations, 23 had not signed union cards. Pet. App. 85-90.

Soon after separating all the second shift employees, petitioner began working employees overtime. Petitioner moved to the new plant about December 1981, began a second shift in late February 1982, and added a third shift in March 1982. Between February and August, petitioner hired nearly 50 "temporary" employees to help clean out old packing material and also to do the same production work as the employees transferred from the old plant. Pet. App. 90-95.

In early April 1982, employees Mark Raborn and Jerry Summers received subpoenas to testify at a hearing concerning petitioner's alleged unfair labor practices. Soon thereafter, assistant production manager Broadwell told employee Nella Broadwell that Raborn and Summers would lose their jobs because they were going to testify against petitioner and that Raborn was specially targeted because " 'they thought he was an informant' " for the Union. Sometime between April 9 and April 16, manager Broadwell told Nella to stop talking so much to Summers and Raborn. Pet. App. 103-105.

On April 16, 1982, assistant manager Broadwell told Nella that she had been seen discussing the Union with Summers (Pet. App. 105-106). The next day, when Nella inquired whether an apparent crackdown on her work performance had to do with the Union, production manager Denton responded (*id.* at 107): "[Y]es, * * * 'I have so much trouble back there in the back that I have to constantly keep my eye on it * * *. I just can't take any chances.' " Later that day, Denton told Nella not even to say " 'good morning' " to Summers and Raborn because " 'it would just encourage them' " (*id.* at 107-108 & nn.92, 113). The next morning, when Nella com-

plained to Denton about not being permitted to talk to the employees working near her, Denton discharged Nella, assertedly for insubordination. Denton stated that Nella "had done this to herself, [and] that her work was good" (Pet. App. 108-111).

Finally, a few days after employee Raborn testified at the unfair labor practice hearing, he was transferred from the first to the third shift, which operated from 10 p.m. to 7 a.m. When he reported to the third shift on May 6, he was assigned to act as both machine operator and inspector for all six machines on the shift. Raborn told a supervisor that it was impossible to do both jobs; the supervisor agreed but stated that they had been unable to get management to assign an inspector. During that night and the next day, Raborn had trouble operating all the machines on the shift. On May 10, Raborn was told to serve only as machine operator, and the machines ran "perfect[ly]" that night. On the following night's shift, however, Raborn was again assigned both jobs. When plant manager Hood came in the next morning, he discharged Raborn for "not doing assigned work properly." Prior to his discharge, Raborn had never been warned about poor work performance. Pet. App. 112-117.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening and interrogating various employees and by engaging in surveillance of their union activities (Pet. App. 13-15, 137-140). The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by reprimanding employee Zackery and by laying off the 21 employees in July 1981 because of

their union activities, and by imposing a no-talking rule on employee Nella Broadwell and then discharging her for protesting that rule (Pet. App. 142-151, 155-157). Finally, the Board found that petitioner violated Section 8(a)(4), (3), and (1) of the Act, 29 U.S.C. 158(a)(4), (3), and (1), by discharging employee Raborn because of his union activity and because he testified at the unfair labor practice hearing (Pet. App. 152-155).

With respect to the termination of employees in July 1981, the Board found that, prior to petitioner's move to the new facility, petitioner "hoped and expected that the move would enable it to use fewer employees than previously to produce a given number of cones" and that it therefore could not be said "that it was the Union's advent which motivated [petitioner's] 1981 decision not to retain its entire work force" (Pet. App. 141-142). The Board noted, however, that "an employer who has decided for lawful economic reasons to diminish the size of his work force violates Section 8(a)(3) and (1) of the Act by selecting employees for inclusion in the layoff because of their actual or suspected union activity" (Pet. App. 142), and it concluded that petitioner had selected the employees for termination in July 1981 because of their union activities.

The Board explained that petitioner was aware of the union activity of the discriminatees and had demonstrated its hostility to the organizing campaign in the numerous instances of threats, interrogations, and surveillance that independently violated the Act (Pet. App. 142-145).[2] And the Board found that "the rea-

[2] The Board dismissed allegations that petitioner acted unlawfully in discharging six employees as to whom there was no evidence either that they had engaged in union activity or that petitioner suspected them of such activity (Pet. App. 140-142).

sons which [petitioner] has advanced for selecting these employees for inclusion in the separations are either nonexistent, false, highly improbable, or unsupported by * * * company records" (*id.* at 145). Specifically, the Board found that the record evidence belied petitioner's contentions that certain employees were selected for termination because they were less qualified or had poorer records than those retained, or that others were separated due to a lack of work on the second shift (*id.* at 145-151). The Board similarly found that "the real reason for Raborn's discharge was his union activity and his conduct in testifying * * * in support of the Union's charge," and that employee Nella Broadwell was discharged for protesting the unlawful anti-union rule imposed on her and for no other reason (*id.* at 152, 154, 156-157).

3. The court of appeals enforced the Board's order in full (Pet. App. 2-12). With respect to the discharges, the court noted that, although petitioner "asserted legitimate reasons for its selection of employees for layoff and for the discharges," the Board "considered each justification * * * and found each one pretextual" (*id.* at 5); it found "that the workers actually terminated or laid-off had been selected for illegal reasons (their real or suspected union activity)" (*id.* at 9). Concluding that these findings were supported by substantial evidence (Pet. App. 10, 12), the court rejected petitioner's contentions that the Board had erred in failing expressly to state its findings in terms of its *Wright Line*[3] analysis applicable to dual motive discharges; because the company "had failed to prove its affirmative defense," there re-

[3] *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

mained only an anti-union motive for its action and the *Wright Line* analysis was inapplicable (*id.* at 10).

ARGUMENT

Relying largely on a version of events that the Board did not credit and ignoring the credited evidence of anti-union conduct that formed the basis for the Board's findings, petitioner contends (Pet. 11-21) that the Board erred in failing to uphold the discharges here by applying its *Wright Line* analysis. This factbound contention was correctly rejected by the court of appeals, and review by this Court is not warranted.

In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), this Court approved the Board's allocation of the burden of proof set forth in *Wright Line* for determining the lawfulness of discipline of an employee engaged in union activity when the employer asserts that the adverse action was taken for lawful reasons. Under the Board's *Wright Line* analysis, where an employer's opposition to union activity has been shown to be a substantial or motivating factor in a decision to take adverse action against an employee, that decision will be found to constitute an unfair labor practice unless the employer is able to demonstrate that the adverse action would have taken place even in the absence of the protected conduct. *NLRB* v. *Transportation Management*, 462 U.S. at 401-403. But where, as here, the employer's proffered lawful reason is found to be a mere pretext to disguise unlawful discrimination, the Board's inquiry is logically at an end. As the Board has explained (*Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982)):

> [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

See also *NLRB* v. *Transportation Management*, 462 U.S. at 400 n.5.

Here, the Board found that, although petitioner did intend at some point to reduce the size of its workforce for legitimate reasons, its *sole* reason for selecting the specific employees who were discharged was its hostility to their union activity. The Board found that petitioner's asserted "reasons * * * for selecting these employees * * * [were] either nonexistent, false, highly improbable, or unsupported by * * * company records" (Pet. App. 145). In short, the Board found that petitioner's proffered reasons were pretextual and therefore that petitioner had failed to show any proper motivation for the adverse action; accordingly, petitioner failed to meet its burden of proving that the adverse action would have taken place absent the improper motivation. The court of appeals found that the finding of pretext was "supported by substantial evidence" (*id.* at 10). Given this finding, even petitioner concedes (Pet. 12 (footnote omitted)) that "*Wright Line* has no application." Thus, petitioner's argument amounts to no more than a claim that the findings of pretext were not supported by substantial evidence. That contention does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the court of appeals found and as the facts set forth above (pages 3-8, *supra*) plainly demonstrate, there is ample support in the record for the Board's conclusions that the dis-

charges in question were motivated by anti-union animus and that petitioner did not in fact rely on any legitimate reasons in discharging the employees.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's contention (Pet. 21-27) that the length of the decision of the administrative law judge precluded effective judicial review is without merit. The court of appeals noted that "[t]he facts of this case are well documented" in the decision of the ALJ (Pet. App. 3) and that the Board's conclusions were supported by the evidence. Moreover, we note that the length of the ALJ's decision was caused in substantial measure by the need to explain and analyze the numerous violations of the Act committed by petitioner and to consider the numerous pretextual justifications that it offered in an attempt to explain its unlawful conduct.

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